

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

**HERBERT K. NELSON**  
**705 Preston Drive**  
**Milan, NM 87021**

**Plaintiff**

v.

**UNION PACIFIC RAILROAD  
COMPANY, A DELAWARE  
CORPORATION**  
**1400 Douglas Street**  
**Omaha, NE 68179**

**Defendant**

**CIVIL ACTION**

**NO:**

**JURY TRIAL DEMANDED**

**COMPLAINT**

1. This suit is governed by the Federal Employers' Liability Act, 45 U.S.C. Sec. 51 et seq., which Act grants this Court jurisdiction over this action.
2. Plaintiff, Herbert K. Nelson, is a competent individual residing at the above-captioned address.
3. At all times relevant hereto, the Defendant, Union Pacific Railroad Company was engaged in interstate commerce as a common carrier by rail, operating a line and system of railroads and transacting substantial business throughout the states of Nebraska, New Mexico and other states of the United States.
4. At all times relevant hereto, the Plaintiff was employed by Defendant railroad and was acting in the course and scope of his employment with Defendant, and was engaged in the furtherance of interstate commerce within the meaning of said Act.

5. At all times relevant hereto, the acts of omission and commission causing injuries to the Plaintiff were done by the Defendant, its servants, agents and/or employees acting in the course and scope of their employment with and under the direct and exclusive control of the Defendant.

6. All the property, equipment and operations involved in this occurrence were, at all times relevant hereto, owned and/or under the direct and exclusive control of the Defendant, its agents, servants and/or employees.

### **COUNT I**

7. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 6, inclusive, as though fully set forth at length.

8. On or about a date between May 1, 2005 and May 30, 2005, while working in the course and scope of his duties, the Plaintiff, Herbert K. Nelson, was injured while pulling a spike.

9. The aforesaid occurrence was directly and proximately caused in whole or in part by the negligence of the Defendant and/or the negligence of the Defendant's agents, servants and/or employees.

10. As a direct and proximate result of the Defendant's negligence, the Plaintiff has suffered and will continue to suffer damages to his right shoulder including a torn rotator cuff and an aggravation of a pre-existing arthritic/degenerative condition.

11. By reason of the aforesaid injuries, the Plaintiff has been disabled from gainful employment, his earning capacity has been permanently impaired, he has incurred and will continue to incur medical expenses, and he has suffered and will continue to suffer inconvenience, great physical and mental pain and embarrassment.

**WHEREFORE**, the Plaintiff, Herbert K. Nelson, demands judgment against the Defendant, Union Pacific Railroad Co., in a sum in excess of ONE HUNDRED FIFTY THOUSAND DOLLARS (\$150,000.00) and the costs of this action.

**COUNT II**

12. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 11, inclusive, as though fully set forth at length.

13. Throughout his career with the Defendant, the Plaintiff, while working within the course and scope of his employment, was injured due to the negligence of the Defendant, both generally and in the following particulars:

- (a) In failing to use ordinary care and caution to provide Plaintiff a reasonably safe place in which to work;
- (b) In failing to take any effective action to reduce, modify or eliminate certain job duties, equipment or practices so as to minimize or eliminate cumulative and repetitive trauma to which Plaintiff would be exposed;
- (c) In failing to periodically test employees such as the Plaintiff for physical effects of repetitive trauma, and failing to take appropriate action, including advising the Plaintiff as to the test results;
- (d) In failing to warn the Plaintiff of the risk of repetitive trauma injuries as a result of exposure to repetitive occupational trauma;
- (e) In failing to make reasonable efforts to inspect or monitor the levels/amounts of repetitive trauma produced by the work duties/tasks which the Plaintiff was required to perform for the Defendant; and,
- (f) In failing to provide the Plaintiff with protective equipment

designed to protect him from repetitive trauma injuries as a result of exposure to repetitive occupational trauma and/or supply him with equipment which would eliminate his exposure to occupational stressors.

8. The aforesaid occurrences were directly and proximately caused in whole or in part by the negligence of the Defendants and/or the negligence of the Defendants' agents, servants and/or employees.

9. By reason of the aforesaid injuries, the Plaintiff has been disabled from gainful employment, his earning capacity has been permanently impaired, he has incurred and will continue to incur medical expenses, and he has suffered and will continue to suffer inconvenience, great physical and mental pain, and embarrassment.

10. As a direct and proximate result of the Defendant's negligence, the Plaintiff has suffered and will continue to from injuries to both his shoulders which include, but are not limited to arthritis, degenerative joint disease, shoulder impingement and the continuing aggravation of said injuries.

**WHEREFORE**, the Plaintiff, Herbert K. Nelson, demands judgment against the Defendant, Union Pacific Railroad Co., in a sum in excess of ONE HUNDRED FIFTY THOUSAND DOLLARS (\$150,000.00) and the costs of this action.

JOSEPH J. CAPPELLI & ASSOCIATES

Date: 4/3/08

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